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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

JAMES CUNNINGHAM,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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Defendant in Error will first present a view of the evidence.

The ore bodies in the Keane Wonder Mine consisted of what is known as a flat or blanket vein. The ore body in the big stope, some six hundred feet in circumference, where plaintiff was injured, was a flat or blanket vein but irregular, it was not perfectly flat but had a slight pitch and was slightly waving as to foot and hanging walls. The distance between the foot wall and the hanging wall varied throughout the stope. A portion of the stope had been worked out long prior to the 9th of December,

1911, a portion of the stope was supported by stulls, other portions were supported by pillars of ore left varying in size and shape. In the older portions of the stope where pillars had been left, these pillars were reduced in size by mining of a part of the pillar from time to time. The ore body varying in thickness up to fifteen feet or more contained a flat seam running through it at about six or seven feet above the foot wall. The ore below the flat seam was broken out by means of the Piston drills, working straight ahead. The ore above the seam referred to was mined by means of the Waugh drills which were used to break down the upper part of the ore vein from the hanging wall. The hanging wall consisted of graphitic schist. Between the hanging wall and the ore body, lying upon the hanging wall, was a seam of soft material commonly known as gouge. After the lower part of the vein, the ore body resting upon the foot wall up to the before-mentioned seam in the ore body, at a distance of six or seven feet above the foot wall was mined by means of the Piston machines, the upper part of the ore body, several feet in thickness, was comparatively safe to work under for the reason that it was solid, but after the Waugh machines had been used and the upper part of the ore body in the vein blasted, the situation became entirely different. The blasting would naturally and inevitably disturb and loosen the beforementioned seam of gouge and if any of the ore in the upper part of the seam failed to come down by reason of the blasting following the work of the Waugh

drills it would be dangerous for men to work under it unsupported. Proper mining would indicate that all of the ore upon the hanging wall should be broken down and proper regard for the safety of the miners and muckers would demand either that such ore left so hanging should be broken down or supported by stulls. There would be no element of safety to the men working under such a body of ore left hanging upon the hanging wall, attached to the seam or gouge, after the use of the Waugh drills, in the leaving of pillars of ore, unmined, at any point in the stope no pillars could have any effect in preventing the fall of such ore left hanging, but the only effect of such pillars would be to prevent the hanging wall itself coming down. At the point where Cunningham was hurt a body of ore, on the upper part of the vein, had been left on the hanging wall over his head with the before-mentioned seam of gouge between it and the true hanging wall. The pillar system would operate to prevent the caving of the hanging wall itself, but was wholly independent of and useless as a means of protection to the miner against the falling of such bodies of ore left upon the hanging walls at intermediate points. There would be but two ways to protect the miners in such a situation. (a) Break down the ore so left. (b) Support by stulls. The Keane Wonder Mining Company did neither. The condition which resulted in the injury of Cunningham was and must have been well known to the mining Company, its Superintendent and officials. The presence of the seam of gouge, being soft mater-

ial, a sort of mud, was of itself a great factor of danger. It must further be remembered that there were three drilling machines working in the stope and that numerous blasts followed the work of each machine. These blasts would unquestionably have a tendency to shake and render loose any ore left upon the hanging wall after the Waugh machines had been used at such a point. The complaint squarely charges that the Mining Company was negligent in leaving that mass of ore upon the hanging wall without timbers or support of any kind. It is the crux of the case, the Mining Company officials knew the ore was there. They set the plaintiff Cunningham to work under it, together with Porter. The duty of Cunningham was to shovel broken ore lying upon the foot wall into a car, and tram it to the chute. The last work done upon the upper part of the ore body at the point where the body of ore was so left hanging to the hanging wall had been done four days previous to the 9th day of December, 1911. Cunningham had no duty except as aforesaid. He was working as a mucker only and as the witness Dropulich testified "A mucker's duty is just to muck." Under specific directions of the boss Cunningham did some other work, to wit, helped to put in the switch track, but no instructions were given him as to making the place safe and no warning was given him as to any danger at the point where he was hurt, or for that matter any other place. Now, the question of negligence hinges upon that situation. Was the defendant Company negligent in so

leaving a mass of ore upon the hanging wall with a seam of gouge between, unsupported by anything whatever at the place where Cunningham was hurt, and setting him there to work without any warning as to any element of danger thereat?

On the trial Cunningham introduced a map marked "Plffs. Ex. No. 1", this map was used during the testimony of Cunningham and of his several witnesses who all regarded it as an accurate map. The Mining Company introduced three maps marked as "Deft's. Ex. A, B and C". The accuracy of these maps is testified to by Homer Wilson, the president and manager of the Mining Company (see record pages 143 to 153). The original maps have not been brought up with the record and there are bound in at the end of the record what purport to be reduced photographic copies of these maps but there is nothing whatever in the case of map "A" to show what is the scale of the map in its present form. The original map as used on the trial is 63 inches long and 34 inches wide, but map "A" in the record is 25½ inches long and 14 inches wide. This map shows the scale to be one inch to 50 feet, and to the right the figure 20'. This was intended no doubt as the scale of the large map used on the trial but it is certainly not accurate as to the map contained in the record. The Mining Company's map "B" as contained in the record shows a number of squares measuring 100 feet each way, so that measuring on this map the present scale appears to be 100 feet to ¾ of an inch; and it is noted in passing that the thickness of the

ore body on this map scales from 20 to 30 feet or in other words the distance between the foot and the hanging-wall in the mine. There is nothing on map "A" to show what is the present scale from which distances may be compared with the evidence of the witnesses; but it seems fair to assume that the photographer in making a reduced copy or photograph of this map made the same proportionate reduction as in map "B". By measuring sizes and distances in accordance with this scale it will readily appear that the distances as given by the several witnesses for the Mining Company do not at all correspond with measurements made on the map.

Cunningham and practically all of his witnesses considered map "A" as incorrect and this will readily appear from the examination of their testimony as appearing on pages 72, 73, 83, 86 and 98. It also appears from the evidence of Roper (record pages 177, 178, 212, 213, 214 and 215) that he, himself, did not consider the map accurate in certain particulars. It also appeared from the cross-examination of the witness Wilson (record page 159) that the map was not a full or complete one.

It is believed that measurements taken from map "A" will show that the evidence of Cunningham and his witnesses correspond more nearly with this map than the evidence of Wilson, Roper and other witnesses for the Mining Company.

Cunningham's testimony as to the position where the ore fell from the roof will be found on pages 58, 59, 74 and 83. Guerra's testimony on the same point

appears on 107, and the testimony of Perez on pages 109 and 112, and of Frank Porter on page 123; while Wilson's testimony appears on pages 152, 157 and 168 and the testimony of Roper on pages 177, 189, 190, 194, 198, 208, 224, 225 and 227.

Cunningham testified that the quantity of ore and rock that fell from the roof, causing his injuries, was in his estimation about 70 tons (record pages 60, 74, 84 and 86). He also testified as to the suddenness of the fall on pages 78 and 82. Lewis Guerra also testified on the same subject (record pages 106 and 107), and Perez on pages 109 and 114, and Porter on pages 121 and 122. See also testimony of Matt Dropulich, pages 93 and 96.

It is true that some of the witnesses for the Mining Company testified that the quantity of ore that fell from the roof was much smaller in amount than shown by the testimony of Cunningham, but this testimony was all elicited after the trial Judge had denied the Mining Company's motion for a non-suit and directed verdict, and at that time the testimony of Cunningham and his witnesses was alone before the court. The verdict of the jury, however, shows or indicates that the jurors believed the testimony of Cunningham to a greater extent than they believed the testimony on behalf of the Mining Company.

The testimony of Cunningham as to the want of support of the roof of the mine appears in the transcript on pages 61, 69, 70, 71, 75, 84, 86 and 87, and the testimony of other witnesses on Cunningham's be-

half, on pages 94, 96, 106, 107, 110, 111, 112, 122 and 123.

The testimony by and on behalf of Cunningham with reference to instructions or directions of the mine foreman will be found in the record on pages 62, 68, 69, 70 77, 80, 81, 82, 94, and 106. It is true that Roper testified for the Mining Company much to the contrary on pages 176 and 206 of the record, but in this respect he is contradicted by several of the witnesses for Cunningham.

It was testified by Cunningham and others of his witnesses that it was not the duty of the muckers but of the miners or machine men or the mine foreman to examine and pick or bar down all loose or dangerous ore or rock on the roof, this appears in the record on pages 62, 78, 80, 81, 82, 94, 95, 106, 116, and 124. It appears, however, that Wilson on pages 164, 174 and Roper on pages 184, 194, 195, 196, 198, 221, 222, 224 do not agree with Cunningham's witnesses, although Roper admitted and showed by his actions that he considered it as a part of his duty to examine the roof and pick down or bar down or if necessary drill and shoot down all ore left on the hanging-wall of the mine. The jury had good reason to believe and apparently did find that the Mining Company owed a duty to Cunningham and other employees to either pick down, bar down or shoot down the ore remaining on the hanging-wall and that the Mining Company and its foreman or other employees did not perform this duty or render the place safe where Cunningham was at work and

injured by the falling of the large mass of ore from the roof. The jury also, practically, found that the Mining Company by Roper, its foreman, had notice and knowledge of the dangerous condition of this ore body hanging from the roof of the mine.

It appeared from the evidence of Homer Wilson (record page 163) that there was a gouge or seam of soft material varying "from the thickness of your hand to 18 inches", and that this fact was known to the Company for it was testified to by the president of the Company. Reference is also made to the testimony of Roper on pages 184, 186, 221, 224. It appears on page 186 that he "drilled a series of holes all the way around which I can show you on the map there—the block of ground; I drilled a series of holes all the way around it and after the men went away I went and loaded the holes and blew that thing myself, and that all came down, a little over 1,500 tons, at one time, that all came down". He also testified that this was in a space without pillars, as large as the court room. It is submitted that if by firing a set of holes surrounding so large a body of ore, the whole body would fall from the roof, that there must have been a well defined gouge of soft material or else so large a body would not have fallen from the roof unless numerous other holes had been drilled all over this ore body; and the Mining Company must necessarily have had full knowledge and notice of the danger of leaving a small or large body of ore hanging from the roof without being either blasted or barred down.

We have already pointed out that there was a very considerable discrepancy in the evidence by and on behalf of Cunningham and for the Mining Company as to the number, position and distance apart of the pillars in the mine; but on the number and position of the stulls or timbers placed in the mine to support the roof, the witness Roper disagrees with Cunningham and all of his witnesses and disagrees also with Wilson and with map "A" prepared by Wilson. Roper swears that he placed, before the injuries received by Cunningham, a row of stulls along the car track close to where Cunningham was injured. If such stulls had been there at such time it is absolutely certain that the map prepared by Wilson by actual measurements and observation on the ground would have shown the stulls; but they are not shown on map "A", nor did Wilson testify to them, and Cunningham and all of his witnesses testified that there were no such stulls placed there. It is not therefore to be wondered at that the jury did not place much reliance upon these statements made by Roper.

Roper in another part of his testimony stated that the body of ore which fell from the roof was attached to one of the pillars and fell directly down from the roof, that this was the pillar shown in the map as N. P. (record pages 189 and 190). Roper testified, pages 190 and 208, that Cunningham was against this pillar N. P. and Porter was against the pillar 23 at the time both were injured by the fall of ore from the roof. Notwithstanding this testimony he testi-

fied at the foot of page 227 that if this lump of rock had struck a man, who was directly beneath, it would have "broken every bone in his body". According to his previous testimony Cunningham was standing against this pillar and directly under the ore body.

The position of Cunningham at the time he received his injuries is shown in the record on pages 58, 59, 60, 63, 78, 83, 85, 87, 107, 112, 113, 114; while Wilson (record page 168) disagreed with Cunningham's testimony only in placing him a little closer to the pillar, within 10 to 12 feet; but the jury evidently accepted Cunningham's version of the position he occupied.

The position of Porter at the time of the cave is shown in the record on pages 63, 78, 84, 112, 121, while Wilson places him in approximately the same position; but Roper places him against a different pillar, 23 instead of against the pillar N. P. where he is placed by all of the other witnesses.

The positions of stulls or timbering are referred to on pages 69, 70, 71, 83, 87, 94, 106, 110, 122 and 123. Little or nothing was testified to by Wilson as to the position or number of stulls, and we have already shown as to the position of the stulls that Roper contradicts all other witnesses on that subject.

As to the duty to examine the roof and pick or bar down the loose ore or rock, see pages 77, 80, 81, 221, 222, 224 of the record.

Cunningham testified (record pages 77 and 78) that the body of the ore had been left hanging from

the roof some four days before he received his injuries, while Roper testified (pages 197 and 201) that the ore had been hanging therefrom about two months. Testimony as to previous falls of ore and rock from the roof and of knowledge of the Mining Company will be found on pages 156, 166, 183, 194, 195, 197, 220, 221 and 224 of the record.

The counsel for the Plaintiff in Error contended that the trial judge ought to have granted their motion for a non-suit or directed verdict, on two grounds: First, because there was not sufficient evidence of negligence by the Mining Company to be submitted to the jury, and second, on the ground that the Federal Court in Nevada ought not to take jurisdiction in this case because of difference in the laws of California and Nevada. We will treat this second ground toward the end of this brief.

The learned and careful trial judge in his decision contained on pages 139, 140 and 141 of the record shows clearly (and we have pointed out the evidence justifying his conclusions), that, in addition to the fact that the ore body did actually fall upon Cunningham, the leaving a large body of ore on the hanging-wall was a fact tending to show negligence, and the other attending facts and circumstances were sufficient to justify the refusal of the trial judge to direct a verdict for the Mining Company or to non-suit Cunningham.

If the Mining Company had desired to secure the benefit of any lack of evidence produced by Cunningham up to the time of the making of this motion, it

ought to have rested and introduced no evidence on its part to controvert the evidence on behalf of Cunningham. It proceeded instead to introduce evidence on its own behalf and Cunningham was entitled to the benefit of any evidence favorable to him introduced by the Mining Company in its defense; and it is undoubtedly true that the witnesses, Wilson and Roper did produce much testimony which absolutely had the tendency to show negligence on the part of the Mining Company and, even if the trial judge had erroneously refused a non-suit, this evidence produced by the Mining Company was certainly sufficient to entitle Cunningham to have the jury pass upon all the evidence produced before it.

In this connection we cite the case of the Reno Brewing Company vs. Packard, 31 Nev. 433, 441, 442 and 443 and the authorities there cited. It is submitted that this court ought to follow in this respect the decision of the Supreme Court of the State of Nevada.

Nevada Revised Laws, section 5651 provides that "all questions of negligence and contributory negligence shall be for the jury". It is submitted that this affects the procedure on the trial of this action and that this Nevada Statute was and is binding on the United States District Court as well as upon this Court.

Counsel for the Plaintiff in Error in their brief on pages 59, 60, 61 and 62 make citations from 26 Cyc. While, for the most part, these citations have no real application to the facts and circumstances of the

case at bar, a fuller examination of the whole article in 26 Cyc. will show that it will not aid the Plaintiff in Error or in any way prove its contentions.

We now make a few citations from 26 Cyc. which have been omitted in the said brief. On pages 1102, 1103, 1104 it is said "Nevertheless the degree of care which the law requires of the master is greater than that which is required of the servant, and the master may be chargeable with negligence in failing to ascertain the danger where the servant is not". On page 1106: "It is actionable negligence on the part of a master to fail to furnish his servant with such tools and appliances as may be required for the reasonably safe prosecution of his work". This is applicable to the failure of the mining company to furnish Cunningham with any bar for the purpose of testing the roof of the stope in which he was working.

On page 1136 of 26 Cyc. it is said "It is not only the duty of the master to use ordinary care to furnish his servant with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time, and by the use of ordinary care and diligence, in making repairs, keep them in a reasonably safe condition". On page 1142 it is said "If he knew or should have known by the exercise of reasonable care and diligence, of their existence, he is liable; negligent ignorance is equivalent to knowledge". Again on pages 1411, 1412 it is said "The maxim "res ipsa loquitur" is applicable only where the

matter of the occurrance or the attendant circumstances are such that the jury can reasonably infer that the occurrence would not have taken place unless the master was lacking in diligence". Again on page 1443 "such causal connection need not, however, be shown by direct evidence, but it is sufficient if it is reasonably indicated by the circumstances". Again on pages 1444, 1445 and 1446 it is said "There must be a preponderance in favor of plaintiff, but this may arise either circumstantially or directly; and *in any event the question should be submitted to the jury where there is any evidence whatever, which has a tendency to show the negligence alleged''* (see numerous cases cited in note 86.) Again on pages 1451 and 1452 it is said "Just what evidence will be sufficient necessarily depends upon the facts of the particular case, and *should be left to the jury.''*

The cases cited on pages 59, 60, 61, 62, 80 and 81 of the brief of the Plaintiff in Error are chiefly with the object of establishing that the doctrine *"res ipsa loquitur''* applies to the facts of the case at bar, and in the cases cited or at least in most of them there was no proof made of anything beyond the actual happening of the event which caused the injuries or the death. In Patton vs. Texas & P. R. Co., from which the opposing counsel have cited at length, 179 U. S. 658, 45 L. ed. 361 we would make some short additional citations; "He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and

when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment". "Tested by these rules we do not feel justified is disturbing the judgment, approved as it was by the trial judge and the several judges of the cir cuit court of appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness there. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection."

In this case the trial judge directed a verdict for the defendant and it was largely so decided because the trial judge had heard and observed the demeanor of the witnesses and it was chiefly for this reason that his decision was sustained. The facts and circumstances of that case bear no resemblance to the facts and circumstances of the case at bar; but applying the same rules as to the hearing of the witnesses and observing their demeanor the decision of Judge Farrington ought to be sustained.

Western Investment Company vs. McPharlan, 166 Fed. 76, cited on page 81 of the mining company's

brief, is an authority which supports the decision of Judge Farrington. The decision on page 79 says: "Is there any substantial evidence tending to show that the rock fell as a result of the defendant's negligence? If so the case was properly submitted to the jury and its verdict is conclusive of that fact. The usual way of guarding against the fall of rock in mining stopes is to brace the walls against each other by timberings or stulls as the stope progresses forward." Texas R.R. Co. Cox, 145 U.S. 593

At the beginning of section 1600, in Labatt's Master and Servant (2nd. Ed.), it is stated, "The doctrine which has very frequently been affirmed in employer's liability cases is that the mere fact of a servant's having been injured owing to the existence of abnormally unsafe conditions, is not of itself sufficient to overcome the presumption entertained by the law, that the master has exercised proper care". The last paragraph of this same section (p. 4864) is as follows: "The doctrine discussed in this section is applicable only in cases where the servant produces no other evidence of negligence than the mere fact of the accident. If specific testimony bearing on that question is submitted, he is entitled to go to the jury."

This last quotation is applicable strictly to the case at bar, where there was considerable specific testimony bearing on the facts and circumstances, besides the mere fall of the rock upon Cunningham.

While the first of the above citations from Labatt is supported by many authorities there is, particu-

larly of late years, much conflict on that point and the tendency of the courts of recent years is very strongly towards giving greater weight to the doctrine of "res ipsa loquitur" and of extending its application to many classes of cases to which the earlier authorities held it not applicable.

In addition to this conflict of authority which has arisen chiefly in recent years, there are many well established qualifications of the doctrine, and many exceptions have been established by the courts and it may be said that these qualifications and exceptions are at least as firmly established as the original doctrine itself and we submit that the authorities supporting these qualifications and exceptions are now much more numerous than authorities supporting the original rule.

Lebatt (vol. 4) in sections 1601 and the foot notes on pages 4865, 4866, 4869, 4870, 4871, 4872, 4873, 4874, 4875, 4876, 4877, 4878, 4879, 4886, 4887, 4888, 4889, 4890, 4892, 4893, 4894, 4900, 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4911, 4912, 4913, 4914, 4915, 4916, 4917, 4918, 4919, has cited many authorities, some of which are digested.

It is submitted that an examination of these authorities will show that the trial judge committed no error in refusing to direct a verdict for the mining company or in refusing to grant the mining company's motion for a non-suit on the ground of insufficiency of evidence to sustain the judgment.

The Plaintiff in Error on page 83 of its brief complains that this action was brought in the State of

Nevada instead of the State of California. It has been so long and clearly settled that, whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties, it seems needless to cite any authorities in support of this doctrine. We cite the cases of Dennick vs. Central R. R. Co., 103 U. S., 11, 26 L. ed. 439; Christensen vs. Floriston Paper Company, 29 Nev., 552, 560 and 562.

In the case at bar the action was commenced in the Nevada State Court and the Plaintiff in Error entered a voluntary appearance and by petition caused the action to be removed to the Federal Court, so that there is no question whatever of the jurisdiction of the Court in the present case.

The case of Dennick vs. Central R. R. Company is looked upon as the leading case as to the right of parties to bring actions in one state where the injuries complained of were suffered in another state in which the law on the subject was different from the law of the forum. This case was approved of and followed in the case of Texas R. R. vs. Cox, 145 U. S. 593. These two cases settle the law on the subject so far as the Federal Courts are concerned, and it requires only a very slight examination of the authorities to show that the United States Courts have approached the subject in a more broad-minded and liberal way than the courts of many states.

It is claimed, however, on behalf of the Plaintiff in Error that the Nevada case of Christensen vs. Floriston Paper Company, 29 Nev. 522, furnishes an authority which this court is bound to follow and that it supports the doctrines established by some of the state courts, which is much narrower than the doctrines established in the Dennick case. It will be observed, however, that on pages 560, 561, 562, 563 and 564, the Nevada Supreme Court cited and quoted from the Dennick and other cases with approval and, in effect, followed them. The most that can be said by the Plaintiff in Error of this case is that the statutes of the state where the injuries were sustained must not be in conflict with the public policy of the State of Nevada. In the Christensen case, under the California Statute, the action was transitory, while under the Nevada Statute it was not transitory but local, this discloses a very much greater difference in the laws of the two states at that time than those existing at the time Cunningham sustained his injuries and also at the time the case was brought to trial in the District Court.

At the time Cunningham sustained his injuries the Roseberry Law was in force in California and there was in force in Nevada a compensation law which contained the following language:

> "Provided, that recovery hereunder shall not be barred where such employee may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable

to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense: (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. No contract, rule or regulation shall exempt the employer from any of the provisions of the preceding section of this act."

At the time of the trial of the action in the District Court there was in force in Nevada a compensation law which contained the following provisions:

"(c) If an employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

"(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment; or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employees in the business:

"(2) That the injury was caused by the negligence of a co-employee:

"(3) That the employee was negligent, unless and except it shall appear that such negligence

was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party:

"(4) In actions by an employee against an employer for personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence."

It is therefore submitted that the provisions of the California law did not conflict with the public policy of the State of Nevada as expressed in both of these statutes from which quotations are made.

On page 84 of the brief for the Plaintiff in Error a quotation is made from the case of the Illinois Central R. R. Company vs. Ihlenberg, 75 Fed. 873, the quotation being taken from page 878 as follows: "Section 193 of the present constitution practically destroys the defense in cases where no wilful or reckless negligence can be predicated of the conduct of the injured and complaining employee. The change is radical, sweeping, unambiguous, and we must enforce it as written". Notwithstanding these phrases used by the court, it is held on page 879 that the Federal Court in Tennessee ought to enforce this radical change made in the Mississippi Statute with reference to torts committed in that state, and many authorities are cited in support of the position taken by the court. In the case of O'Riley vs. N. Y. R. R.

Co., 16 R. I. 388, 19 Atl. 244 cited on page 87 of the brief for the Plaintiff in Error, the court refused to follow the Massachusetts Statute on the ground that this was a penal statute which would not be enforced in a foreign jurisdiction. The Massachusetts Statute provided that the R. R .Co. killing a passenger under certain conditions was subject to a fine of $5,000,— but further provided that the fine should be paid to the proper heirs or relatives of the deceased.

In the case of Welch vs. N. Y. R. R. Co., 160 Mass. 571, Holmes' J. (now on the U. S. Supreme Court Bench) says: "If by the law of another state where a personal injury is suffered and recovery may be had there, an action may be maintained for the injury in this commonwealth, although the plaintiff could not have recovered therefor if the injury had happened here"; and he cites Higgins vs. Central N. E. R. R., 155 Mass. 176 and Story's conflict of Laws (8 ed. section 825) which gives the true doctrine as, "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is reasonable and not opposed to the interests of the state." And citing the Dennick case and Leonard vs. Columbia Steam Navigation Company, 84 N. Y. 48.

In St. Louis R. R. vs. Brown, 62 Ark. 254, 260, 261 it is said "The common law rule is that where the right of action is transitory in its nature courts everywhere, when the defendant may be lawfully summoned to appear therein, for jurisdiction; and when the suit is governed by the statutes of the state

in which the injury is committed, courts of another state having similar laws or where it is not contrary to its public policy, will enforce such laws by the rule of comity. Texas and Pac. R. R. vs. Cox, 145 U. S. 593; Eureka Springs R. R. Company vs. Timmons, 51 Ark. 459; Boyce vs. R. R. Company, 63 Iowa 70; Morris vs. R. I. & Pac. R. Co., 65 Iowa 727; Herrick vs. M. & St. L. R. Co., 31 Minn. 11; Wintuska vs. L. & N. R. R. Co., 20 S. W. 819.

In Chicago St. L. & N. O. R. R. Co. vs. Doyle, 60 Mississippi, Campbell, C. J. says: "The right of action for damages for killing a husband given by the statute of Tennessee may be asserted in the courts of this state, because of the co-incidence of the statutes on this point, and independently of this, because the right of action created by the statute of another state, of a transitory nature, may be enforced here, when it does not conflict with the public policy of this state and permit its enforcement", citing the Dennick case and Nashville etc. Ry. Company vs. Sprayberry, 8 Baxter 341; Selma etc. R. R. vs. Lacey, 49 Geo. 106; Leonard vs. Columbia etc. Company, 84 N. Y. 48; in Dellahaye vs. Heitkemper, 16 Neb. 475, 477, 478; the law is stated to be "while it is true that the statute of another state has no extra territorial effect, yet rights acquired under it will always be enforced, if not against the public policy of the state where the action is brought—in other words courts enforce rights, no matter where they were acquired, if not in contravention of the laws of the forum. In all such cases the law of

the place where the right was acquired controls as to the right of action," citing several cases.

In the cases cited at the foot of page 89 and the first half of page 90 of the brief for the Plaintiff in Error, the actions were brought to recover damages resulting from death and in all of those cases it will appear that there were great, and in some cases, very perplexing differences in the statutes of the different states under consideration and related chiefly to the necessary parties to the actions, beneficiaries and the distribution of the estates and in the procedure.

In the case of Belt vs. G. C. & S. F. R. R. Co., 4 Texas Civ. App. 231, it was held that the laws of Texas and of Louisana were so dissimilar that the Texas Court ought not to assume or hold jurisdiction of the action; but in Texas & Pac. R. R. Co. vs. Cox, 145 U. S. 593, 604, 605 and 606 the court held that the same statutes were not so unlike that the Federal Court in Texas should not take and hold jurisdiction where the injuries were sustained in Louisiana. In this case the Dennick case was referred to as settling the law that, "A right arising under or a liability imposed by either the common law or the statute of the state may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties."

Dale vs. R. R. Co., 57 Kans. 601, and Matherson vs. Kansas C. F. S. & M. R. R. Co., 61 Kans. 677, held that the New Mexico statute in one case and the

Missouri statute in the other case were penal in character and for that reason Kansas courts ought not to take jurisdiction.

It is therefore respectfully submitted that no substantial or reversable error appears in the record.

Dated February 17, 1915.

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